(vii) that in cl 1 of the letter of guarantee, there was the provision that the guarantors would pay on demand all amounts owing by the first defendant to the plaintiff at any time anywhere on any account whatsoever.

The suggestion that the first defendant was not aware of the approval of the application under the SLS is unacceptable. As has been seen, the first defendant's account was overdrawn beyond the limit of $30,000, which state of the account surely must, and in any event has to be deemed to, have been known by the first defendant. Even assuming that the bank had not formally notified the first defendant of the approval of the application, the crediting of the current account with the $30,000 could not have escaped the notice of the first defendant. The bank's transaction code for the item is 10 which has reference to 'local funds transfer', according to the 'explanation of code numbers' that Cik Lisa Chan drew my attention to.

Encik Kan suggested that the $30,000 could have been a payment by one of the first defendant's customers. It is unlikely that such a payment would be a code 10 transaction. In any event, it was for the defendants to show the source of the $30,000 being other than the SLS loan that the plaintiff has proved it to be by exhibiting the application, the crediting of the account and the debiting of the amount in the loan account. Further, the second, third and fourth defendants have, by their statement of defence, conceded that the overdraft account of the first defendant was credited with the $30,000 loan from the SLS. The knowledge of the directors of a company, who are the alter ego of the company, is the knowledge of the company. Having utilized the $30,000, the first defendant's contention that it had no knowledge of the approval of the loan or that it had not accepted it is completely devoid of merit and has to be and is rejected. The contention that, in any event, the bank had not adhered to the rules and regulations of the SLS was not developed and I assume that that line was abandoned.

As to the guarantors, cl 1 of the letter of guarantee clearly covers the SLS loan. The contention that their guarantee was only in respect of account no 1266853 is inconsistent with the said cl 1. The guarantors were at all relevant times the directors of the first defendant and should have known that in the event the SLS loan was obtained, it was an amount that would be owing to the bank, and as such would be within the terms of their letter of guarantee. The suggestion by the second defendant that the second, third and fourth defendants were not aware of the application for the SLS loan is unacceptable. It was the second defendant himself, as managing director, who implemented the application for the loan and the third and fourth defendants, as directors of the company, must be deemed to know what the first defendant company was doing, certainly in respect of its financial affairs.

In any event, by the terms of the guarantee, their lack of knowledge of the successful application for the SLS loan does not do away with their obligation to pay on demand 'all sums of money which are now or shall *at any time* be owing to the bank *anywhere on any account whatsoever* ...' (emphasis provided).

The appeal had to be and was allowed with costs. The plaintiff bank was given leave to enter final judgment as prayed in prayer (a) of the summons encl 12.

Appeal allowed.

Solicitors: *Yip Yeo & Nasrim; CH Liew & Co; Gill & Tang.*

Reported by *Yap Shao Sin*

Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd

HIGH COURT (PENANG) - BANKRUPTCY NO 29(43)-337-88
EDGAR JOSEPH JR J
11 AUGUST 1989

Bankruptcy - Bankruptcy notice - Whether leave to issue execution necessary - Date of commencement of bankruptcy proceedings - Whether it was date of issue of bankruptcy notice or date of service thereof - Sum specified in bankruptcy notice in excess of sum actually due - Whether a mere irregularity - Whether amount claimed specified - Whether proceedings commenced in the correct state - Jurisdiction - Costs of other bankruptcy proceedings not paid - Costs not taxed yet - Bankruptcy Act 1967, ss 3(1)(i) & 131 - Bankruptcy Rules 1969, rr 101(2), 109(1) & 276 - Rules of the High Court 1980, O 46 r 2(1)

Civil Procedure - Execution - Leave to issue execution more than six years after judgment - Whether such leave necessary in bankruptcy proceedings - Bankruptcy Act 1967, s 3(1)(i) - Bankruptcy Rules 1969, r 276 - Rules of the High Court 1980, O 46 r 2(1)

Statutory Interpretation - Conflict between principal legislation and subsidiary legislation - Principle applicable - Bankruptcy Act 1967, s 3(1)(i) - Bankruptcy Rules 1969, r 276

In this case, a judgment debtor sought to impugn a bankruptcy notice on a number of grounds. The bankruptcy notice was founded on a judgment debt which came into existence on 13 May 1982. The bankruptcy notice was issued on 12 May 1988 and served on the judgment debtor on 9 June 1988. It was contended that the proceedings in bankruptcy had been commenced more than six years after judgment had been recovered without the leave of the court as required under O 46 r 2(1) of the Rules of the High Court 1980. It was contended for the judgment creditor that as r 276 of the Bankruptcy Rules 1969 excluded the application of the Rules of the High Court 1980 to bankruptcy proceedings, no such leave was required. The second point taken for the judgment debtor was that the bankruptcy notice included interest not recoverable under s 6(3) of the Limitation Act 1956 which provided that no arrears of interest in respect of any judgment debt shall be recoverable after the expiration of six

years from the date on which the interest became due. It was also submitted that the bankruptcy notice included penal interest. The judgment debtor had affirmed and filed an affidavit in the registry of the court on 20 June 1988 disputing the sum specified in the bankruptcy notice on the amount due and served the same on the judgment creditor's solicitors on 21 June 1988. The third point taken for the judgment debtor was that the schedule to the bankruptcy notice did not specify the exact amount of the interest due. The fourth ground of objection was that it had not been shown that the solicitors who applied for the issue of the bankruptcy notice had the authority to do so. The fifth ground was that the proceedings ought to have been filed in the High Court at Alor Setar as the judgment debtor had been at all material times a resident of the state of Kedah. The final point taken was that the judgment creditor owed the judgment debtor costs in another bankruptcy matter. The costs in the other bankruptcy matter had not been taxed yet.

Held, dismissing the judgment debtor's application:

(1) In regard to the contention regarding r 276 of the Bankruptcy Rules 1969, the overriding consideration was the proper interpretation of s 3(1)(i) of the Bankruptcy Act 1967 regarding the commission of an act of bankruptcy by reason of not complying with a bankruptcy notice. The court was not at liberty to brush aside the explicit provisions of s 3(1)(i) of the Act merely because of r 276 of the Bankruptcy Rules 1969. Accordingly, if there was any conflict between those two measures the court would regard s 3(1)(i) as having overriding effect since it ranked as principal legislation whereas the Bankruptcy Rules 1969 are subsidiary legislation.

(2) On the question whether, at the material time, the judgment creditor was in a position to issue execution on the judgment, the relevant date was the date of the issue of the bankruptcy notice and not the date of the service of the bankruptcy notice. Adopting the date of issue of a bankruptcy notice rather than the date of its service as the material time is fairer because delays could well be due to the debtor deliberately avoiding service. In the present case therefore, there was no need for leave to issue execution against the judgment debtor at the time of the issue of the bankruptcy notice.

(3) The sum specified in the bankruptcy notice as being due by way of interest exceeded the amount actually due but the seven-day period stipulated in the bankruptcy notice as being the time allowed for disputing payment had already expired at the time of filing in the registry of the court and service on the judgment creditor's solicitors of the judgment debtor's affidavit disputing the sum specified in the bankruptcy notice.

(4) In any event, having regard to the particular circumstances of the case, the defect in the bankruptcy notice was a mere irregularity which had caused no substantial injustice and so can and should be condoned under s 131 of the Act. For the same reasons, the contention that the bankruptcy notice included penal interest must be rejected. In any event, the bankruptcy notice included nothing of the sort.

(5) The bankruptcy notice did specify the exact amount claimed to be due on the judgment and the accompanying schedule gave the particulars as to how that sum was arrived at.

(6) On the evidence the solicitors concerned had the requisite authority to issue the bankruptcy notice.

(7) Clearly, there had been a breach of r 109(1) of the Bankruptcy Rules 1969 by reason of the filing of the proceedings in Penang instead of Alor Setar but the breach was a mere irregularity. The High Courts of each state in the country are but branches of the High Court of Malaya and each branch has concurrent jurisdiction to entertain any civil proceedings regardless of whether the cause of action arose in another state. In the instant case therefore, the court had the jurisdiction to rule on the validity of the bankruptcy notice.

(8) The alleged costs of the other bankruptcy matter had not been taxed and so was not a liquidated sum or a money demand which was ascertainable with certainty.

Cases referred to

1 *Re V Gopal, ex p Bank Buruh (M) Bhd* [1987] 1 CLJ 602 (not follid)
2 *Re A Bankruptcy Notice* [1898] 1 QB 383 (follid)
3 *Re Ide, ex p Ide* (1886) 17 QBD 755 (follid)
4 *Re Woodall, ex p Woodall* (1884) 13 QBD 479 (follid)
5 *Re Dato Loh Fook Yen, ex p Malayan United Finance Bhd* [1988] 3 MLJ 499 (follid)
6 *Rengasamy Pillai* v *Comptroller of Income Tax* [1970] 1 MLJ 233 (PC) (follid)
7 *Ghazali bin Mat Noor* v *Southern Bank Bhd* [1989] 2 MLJ 142 (refd)
8 *Sova Sdn Bhd* v *Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268 (follid)
9 *Ratna Ammal* v *Tan Chow Soo* [1971] 1 MLJ 277 (follid)

Legislation referred to

Bankruptcy Act 1967 ss 3(1)(i), 131
Bankruptcy Rules 1969 rr 109 (1), 276
Rules of the High Court 1980 O 46 r 2(1)

Darshan Singh for the judgment debtor/applicant.
Louis E Van Buerle (*Tan Hiang Joo* with him) for the judgment creditor/respondent.

Cur Adv Vult

Edgar Joseph Jr J: In this case the judgment debtor has sought to impugn the bankruptcy notice herein on a number of grounds.

First of all, the bankruptcy notice having been issued on 12 May 1988 and served upon the judgment debtor on 9 June 1988 although the judgment debt upon which it was grounded was dated 13 May 1982, it was said that proceedings in bankruptcy had been commenced more than six years after judgment had been recovered, without leave of the court as required under O 46 r 2(1) of the Rules of the High Court 1980. The case of *Re* V *Gopal, ex p Bank Buruh (M) Bhd*[1] was cited in support.

Now, I need hardly say that a condition precedent to bankruptcy is that a debtor must have made himself liable to be proceeded against by committing an act of bankruptcy, that is to say, one of the eight acts which constitutes presumptive evidence of insolvency and which is the judicial event upon which the court has the power to make a receiving order. (See s 3(1) of the Bankruptcy Act 1967 ('our Act').)

In the present case, the only act of bankruptcy alleged was that the judgement creditor having obtained a final judgment, had caused to be served upon the debtor the bankruptcy notice aforesaid with which he had not complied within seven days after service. (See s 3(1)(i) of our Act.)

The key to the solution of the problem posed by this branch of the judgment debtor's submissions is the proper interpretation to be placed on s 3(1)(i) of our Act and the proviso thereto which, omitting immaterial portions, read as follows:

> A debtor commits an act of bankruptcy ...
>
> (i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him ... a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order,... and he does not within seven days after service of the notice ... comply with the requirements of the notice ...
>
> Provided that for the purposes of this paragraph ... any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order;...

In the UK, the provisions of s 1(1)(g) of the Bankruptcy Act 1883, which are generally in pari materia with s 3(1)(i) of our Act, have been judicially considered and I have derived much assistance from the cases decided there.

Before I embark upon a consideration of the UK decisions, I would make the preliminary observation that the issue of a bankruptcy notice is not execution to enforce a judgment. (See eg *Re A Bankruptcy Notice*[2] per Chitty LJ at p 386.) At most, it seems to me that the issue of a bankruptcy notice may be regarded as a species of practical enforcement.

I shall now take the cases in the UK to assist me in my task of interpreting s 3(1)(g) of our Act.

In *Re Ide, ex p Ide*[3] the creditor had obtained judgment against a firm and had purported to issue a bankruptcy notice founded on that judgment against an individual partner. By s 4 sub-s 1(g) of the Bankruptcy Act 1883, the statutory predecessor of the Bankruptcy Act 1914, it was a condition for the validity of a bankruptcy notice founded on a final judgment or final order that execution had not been stayed thereon. The Court of Appeal held that on the proper construction of the subsection, to entitle a creditor to issue a bankruptcy notice he must be in a position to issue execution on his judgment at the time when he issued his bankruptcy notice. In other words - I would interpolate - in addition to there being no stay on the judgment, there must be no other impediment to issue execution on the judgment. Accordingly, O XLII r 10(c) of the RSC (the predecessor of the present O 81 r 5(4)) requiring the leave of the court to issue execution, was held to be such an impediment.

In *Re Woodall, ex p Woodall,*[4] one Houlston had recovered a final judgment against Woodall. Houlston then died and his executrix served a bankruptcy notice on Woodall without obtaining leave from the court under r 23 of O XLII of the RSC 1883 to issue execution on the judgment. The bankruptcy notice not having been complied with, the executrix presented a bankruptcy petition. The registrar made a receiving order.

On appeal, the question for decision was whether the executrix was a 'creditor' within the meaning of s 4 sub-s 1(g) of the Bankruptcy Act 1883. It was argued that the representative of the person who originally obtained the final judgment does not fill the character of creditor under sub-s 1(g), if he has not obtained leave under r 23 to issue execution. In upholding that submission, Baggally LJ said:

> But those words ('and execution thereon not having been stayed' in sub-s 1(g)) tend to show that the creditor spoken of must be a person who is in a position to issue execution upon the final judgment. The original creditor is in that position. If the person who applies for the notice is the executor of the original judgment creditor he does not, as I read the subsection, fill the required character until he has obtained leave to issue execution on the judgment.

The cases of *Re Ide*[3] and *Re Woodall*[4] have stood unchallenged for more than 100 years and I take it that they represent the law on the point concerned.

To my mind, it is not an unfair summary of the position in the UK to say that a creditor can issue a bankruptcy notice only when he has obtained a final judgment or a final order. The judgment or order must be one on which the creditor is in a position to issue execution so that if execution cannot be issued at all, no bankruptcy notice can be issued. If the execution can be issued only with leave of the court, the creditor must obtain such leave before he can issue a bankruptcy notice.

It was urged upon me by counsel for the judgment creditor that I should decline to follow the cases of *Re Ide*[3] and *Re Woodall*[4] because, in this country, unlike in the UK, we have r 276 of the Bankruptcy Rules 1969 ('the BR'), which expressly provides that the Rules of the Supreme Court (now the Rules of the High Court 1980) regulating the procedure in its civil jurisdiction shall not apply to any proceedings in bankruptcy. Accordingly, it was submitted that there being no requirement in the BR that leave was required for commencing bankruptcy proceedings founded on a judgment entered more than six years previously, no such leave was required. As such, the only bar to the commencement of bankruptcy proceedings would be if and when a judgment creditor is barred by s 6(3) of the Limitation Act 1953 - so ran counsel's submission.

I regret I find counsel for the judgment creditor's submission regarding this part of the case unacceptable. In my opinion, the overriding consideration here is, as I have indicated, the proper interpretation of s 3(1)(i) of our Act. I am not at liberty to brush aside the explicit provisions of s 3(1)(i) merely because of r 276 of the BR. Accordingly, if there is any conflict between these two measures I would regard s 3(1)(i) as having overriding effect since it ranks as principal legislation whereas the BR are

subsidiary legislation. (See s 23(1) of the Interpretation (States of Malaysia) Act 1967.) In my view, therefore, the UK decisions are of direct relevance when construing s 3(1)(g) of our Act and I would respectfully follow them.

Accordingly, I must next consider whether, at the material time, the judgment creditor in this case was in a position to issue execution on his judgment. The question arises, what is the material time?

In *Re* V *Gopal*,[1] VC George J held (at para 9) that the material date was not the date of issue of the bankruptcy notice but the date of its service. In so holding, he appears to have been swayed by the decision of the Court of Appeal in *Re Ide*[3] for he says (at para 5):

> In the judgment of the English Court of Appeal in *Ex p Ide* (1886) 17 QBD 755 it was held that when a creditor has obtained judgment against a firm but has not obtained the requisite leave of court to issue execution against a person alleged to be a member of the firm, he cannot effectively serve such a person with a bankruptcy notice.

It also appears that, in referring to the ratio in *Ex p Ide*,[3] he relied on the headnote to the report of that case. However, it seems to me that a reading of the three judgments in that case, makes it clear that the Court of Appeal held (as I have already said) that on the proper construction of the subsection concerned, to entitle a creditor *to issue* a bankruptcy notice he must be in a position to issue execution on his judgment *at the time when he issued his bankruptcy notice*. To demonstrate, I propose to reproduce the relevant passages in the three judgments.

In the first place, I shall refer to the following passages in the judgment of Lord Esher MR at p 759 para 2:

> Under these circumstances, is he a person against whom, under s 4, sub-s 1(g) of the Bankruptcy Act, *a bankruptcy notice can be issued*, upon failure to comply with which he can be made a bankrupt? Subsection 1(g) says: 'If a creditor has obtained a final judgment against him' (that is against the person whom he proposes to make bankrupt) 'for any amount, and, execution, thereon not having been stayed,' has served on him a bankruptcy notice. It is true that in the present case execution on the judgment has not been stayed, but the words seem to me necessarily to imply that the judgment must be one upon which execution could go immediately, unless it was stayed. But here execution cannot go immediately whether it is stayed or not; it cannot go without the leave of the court. I think, therefore, that this was not a final judgment such as is described in sub-s 1(g) on which *a bankruptcy notice could issue*. (Emphasis supplied.)

Next, I shall refer to the following passages in the judgment of Bowen LJ where the point is made even more emphatically at p 759 para 4:

> With regard to the construction of sub-s 1(g) of s 4, I also agree that, in order *to entitle a creditor to issue a bankruptcy notice, he must be in a position to issue execution on his judgment at the time when he issues the bankruptcy notice*. (Emphasis supplied.)

Lastly, I shall refer to the following passages in the judgment of Fry LJ at p 760 para 2:

> It would be very strange if the enactment were that a bankruptcy notice could not be *issued* when execution on the judgment had been stayed, and yet that a bankruptcy notice could be *issued* when execution could not go at all without the leave of the court, and the proceedings had not been stayed simply for that reason. (Emphasis supplied.)

I regret, therefore, that I cannot agree with VC George J when he says in *Re* V *Gopal*[1] that the relevant date for determining whether the creditor was in a position to issue execution on his judgment is the date of the *service* of the bankruptcy notice.

I would add that quite apart from authority, in principle, adopting the date of issue of a bankruptcy notice rather than the date of its service as the material time is fairer because delays in effecting service are often not the fault of a creditor. Indeed, such delays could well be because the debtor is deliberately avoiding service.

Consequently, following *Re Ide*,[3] I would hold that the relevant date is the date of the issue of the bankruptcy notice. It goes without saying that if a creditor cannot issue a bankruptcy notice, he cannot serve one and so there cannot possibly be an act of bankruptcy as defined in s 3(1) of our Act.

In the present case, I have already mentioned in the opening paragraph of this judgment that the judgment debt was dated 13 May 1982, and the bankruptcy notice upon which it was grounded was issued on 12 May 1988. This would be within the six-year time limit imposed by O 46 r 2(1). There was, therefore, no need for leave to issue execution against the judgment debtor at the time of the issue of the bankruptcy notice and so this ground of objection fails.

The second point taken on behalf of the judgment debtor was that the bankruptcy notice includes interest not recoverable under the second limb of s 6(3) of the Limitation Act 1953, which provides that 'no arrears of interest in respect of any judgment debt shall be recoverable after the expiration of six years from the date on which the interest became due'. A perusal of the judgment upon which the bankruptcy notice was grounded shows that it provides for the payment of interest on the judgment debt 'at the rate of 8% pa calculated from 12 March 1982 to date of payment or realization'. The bankruptcy notice was, as I have already noted, issued on 12 May 1988 and served on the debtor on 9 June 1988.

It therefore does include an element of interest recovery which is barred by s 6(3) of the Limitation Act 1953, namely, a trifling sum of interest in respect of a period of just two months. Accordingly, the sum specified in the bankruptcy notice as being due by way of interest exceeds the amount actually due.

However, our Act by proviso (ii) to s 3(2) reads as follows:

> Provided that a bankruptcy notice ...
>
> (ii) shall not be invalidated by reasons only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake;...

In this case, the judgment debtor had affirmed and filed an affidavit in the registry of the court on 20 June 1988 disputing the sum specified in the judgment notice as the amount due, and served the same on the judgment creditor's solicitors on 21 June 1988.

But, the seven-day period stipulated in the bankruptcy notice as being the time allowed for disputing payment had expired at midnight on 16 June 1988 with the result that the notice given to the judgment creditor was out of time. Consequently, in the words of proviso (ii), the bankruptcy notice 'shall not be invalidated by reason only that the sum specified in the notice exceeds the amount actually due' and therefore this ground of objection fails. (See *Re Dato Loh Fook Yen, ex p Malayan United Finance Bhd.*[5])

In any event, I am of the view that having regard to the particular circumstances of this case, the defect in the bankruptcy notice was a mere irregularity which had caused no substantial injustice and so can and should be condoned under s 131 of our Act. (See *Rengasamy Pillai* v *Comptroller of Income Tax.*[6])

For the same reasons, the contention that the bankruptcy notice includes penal interest must be rejected. In any event, I am satisfied that the bankruptcy notice includes nothing of the sort.

The third point taken on behalf of the judgment debtor was that the schedule to the bankruptcy notice does not specify the exact amount of interest due, contrary to the Supreme Court decision in *Ghazali bin Mat Noor* v *Southern Bank Bhd.*[7] A perusal of the bankruptcy notice shows that it does specify the exact amount claimed to be due on the judgment dated 13 May 1982 and the accompanying schedule stapled to the bankruptcy notice gives the particulars as to how that sum is arrived at. In the circumstances, it seems to me that there is nothing in the point.

The fourth point taken was that it had not been shown that the solicitors who applied for the issue of the bankruptcy notice pursuant to Form 4 of the BR had the authority to do so. I am satisfied from a perusal of the affidavit of the judgment creditor's manager Ong Chin Huat affirmed to on 3 December 1988 (encl 10), to which is attached the letter of authority dated 10 May 1988, that the solicitors concerned had the requisite authority to issue the bankruptcy notice and nothing more need be said about the point.

The fifth point taken on behalf of the debtor was that the proceedings herein ought to have been filed not in the High Court of Penang, but in the High Court of Alor Setar, as he had been at all material times a resident in the State of Kedah.

I note that r 109(1) of the BR provides that a bankruptcy notice shall be issued by the court in which a bankruptcy petition against the debtor may subsequently be filed. And, r 101(2) of the BR provides that 'where the debtor has for the greater part of one year immediately preceding the presentation of the petition carried on business in one state and resided in another state, the petition shall be filed in the court of the state in which he has carried on business.

Clearly, there has been a breach of r 109(1) of the BR and so the question arises whether the same should be condoned under the provisions of r 274 of the BR which provides:

> Non-compliance with any of these rules or with any rule of practice for the time being in force shall not render any proceeding void unless the court shall so direct but such proceeding may be set aside either wholly or in part as irregular or amended or otherwise dealt with in such manner and upon such terms as the court may think fit.

The case of *Sova Sdn Bhd* v *Kasih Sayang Realty Sdn Bhd*[8] reminds us of the familiar proposition that the High Court of each state in our country are but branches of the High Court of Malaya and that each branch has concurrent jurisdiction to entertain any civil proceeding regardless of whether the cause of action arose in another state. I have no doubt, therefore, that I have jurisdiction to rule on the validity of the bankruptcy notice. Furthermore, much time has been spent hearing legal argument as to the validity of the bankruptcy notice and, being satisfied that the breach is a mere irregularity, I shall therefore in the exercise of my discretion, condone the same under r 274. Accordingly, this ground of objection fails.

A final point was taken that the judgment creditor owes the judgment debtor costs in the matter of Bankruptcy No 119/85. The short answer to this is that the alleged costs have not been taxed and so is not a liquidated sum or a money demand which is ascertainable with certainty. (See *Ratna Ammal* v *Tan Chow Soo.*[9]) In all the circumstances, the application to set aside the bankruptcy notice is dismissed and I would declare that the judgment debtor has committed an act of bankruptcy from date hereof.

Application dismissed.

Solicitors: *Cheong Wai Meng & Van Buerle; Darshan Singh & Co.*

Reported by *PS Ranjan*